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MEMORANDUM OF LAW

DATE: October 20, 1998

TO: Barbara A.B. Salvini, Senior Civil Engineer, Development Services Department,
Land Development Review - Water Utilities Section

FROM: Ted Bromfield, Deputy City Attorney

SUBJECT: Minimum Requirements for Sewer and Water Facilities

QUESTION PRESENTED

Can the City Manager impose minimum size and standard requirements on privately constructed water and sewer facilities that are sought to be accepted as public facilities?

SHORT ANSWER

Yes. The City Manager has not only the authority but the duty to prescribe minimum standards on water and sewer facilities since each directly affects the health, safety, and welfare of our citizens.

BACKGROUND

In a recent memorandum, you requested our Office's opinion on the ability of the City Manager to "establish a threshold limit for the size of pump station they would accept as a public facility." Specifically, you described a recent example of an eighteen-unit private pump station that a homeowners' association refused to accept, yet the developer wanted the City to waive some of its design standards and accept it as part of the public sewer system. Appropriately, you attached a letter from the Director of the Metropolitan Wastewater Department to Pardee Construction Company rejecting any compromise of the City standards with supporting reasons. Because you seek our opinion of this letter, we attach it for reference.

ANALYSIS

To supply life-sustaining water and to provide for the lawful disposal of sewage are core responsibilities of local government. Indeed, so critical were these two responsibilities to the City of San Diego's citizens that they are provided for in Section 1 of the City Charter: "Such municipal corporation . . . may own and operate public utility systems, including the joint or sole operation and ownership of utilities for the purchase, development, and supply of water" *See also* San Diego Charter sections 3, 53, 90.1, and 90.2.

The City Manager has been given plenary authority to efficiently manage both the sewer and water systems for the benefit of all citizens and to conform to all sanitary laws.

1. SEWER CONTROL

§ 64.0301 Penalties for Violations

(a) Public Nuisance

Discharge of wastewater in any manner in violation of this ordinance or of any order issued by the City Manager as authorized by this ordinance, is hereby declared a public nuisance and shall be corrected or abated as directed by the City Manager. Any person creating such a public nuisance is guilty of a misdemeanor.

(b) Injunction

Whenever a discharge of wastewater is in violation of the provisions of this ordinance or otherwise causes or threatens to cause a condition of contamination, pollution or nuisance, the City Manager may cause the City to seek a petition to the Superior Court for the issuance of a preliminary or permanent injunction or both, as may be appropriate in restraining the continuance of such discharge.

(c) Costs of Damage

Any person violating any of the provisions of this ordinance or who has a discharge which causes a deposit, obstruction, damage, or any other impairment to the City's facilities shall become liable to the City for all expense, loss, or damage occasioned the City by reason of such violation or discharge.

San Diego Municipal Code section 64.0301.

2. WATER CONTROL

§ 67.51 Water Main Extension — Design and Specifications

The design, location, materials and standards of construction of any and all extensions shall be approved by the Manager.

(a) The design of an extension shall be based upon considerations of adequate capacity to meet the present and future requirements of the area to be benefited, of distribution system operation and efficiency, of maintenance requirements, and of anticipated life of such extension.

(b) Extensions shall generally be located on the south and east sides of dedicated City streets or on sides of dedicated City streets or on rights-of-way granted to The City of San Diego for water main location. Under no circumstances shall any structure be placed over or around any water main or extension, unless provision is made for ready and easy access to any and all parts or points of such main or extension.

(c) Materials and standards of construction shall be those which have been adopted and are used by the Department for the area and class of service to be provided.

San Diego Municipal Code section 67.51.

Such stringent controls, especially over sewage, are clearly necessary to provide the greatest protection against pollution and contamination. Indeed, this stringent control with contingent consequences is mandated by a complex matrix of federal and state water pollution control laws.

The federal Water Pollution Control Act, 33 U.S.C. sections 1251-1387, outlaws the discharge of any pollutant.

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. section 1311.

Designed to restore the ecological health of the nation, federal pollution control is premised on a permit system to reduce and regulate the level of all pollutants. Hence all municipalities are required to obtain and adhere to the restrictions of a National Pollutant Discharge Elimination System [NPDES] Permit. All discharge of sewage in San Diego must conform to the provisions of Order No. 95-105, NPDES Permit No. CA0107409, which mandates in pertinent part:

IT IS HEREBY ORDERED that the City of San Diego (hereinafter discharger), in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act and the regulations adopted thereunder, and the Ocean Pollution Reduction Act, shall comply with the following for the handling, treatment, and disposal of wastes from the E. W. Blom Point Loma Metropolitan Wastewater Treatment Plant through the Point Loma Ocean Outfall:

A. PROHIBITIONS

....

6. The discharge of waste to waters of the State in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in Section 13050 of the CWC, is prohibited.

....

8. The discharge of pollutants or dredged and fill material to waters of the United States (U.S.) except as authorized by a NPDES permit or a dredged or fill material permit (subject to the exemption described in Section 13376 of the CWC) is prohibited.

....

F. PROVISIONS APPLICABLE TO POTWs [Publicly Owned Treatment Works]

....

6. Sewer Overflow Prevention Plan. No later than six months after the adoption of the permit, the discharger shall develop and implement a Sewer Overflow Prevention Plan (SOPP). *The SOPP shall be designed to prevent, or minimize the potential for sewer overflows from the PLOO and in the area tributary to the PLOO, including overflows from the outfalls.* The discharger shall maintain the SOPP in an up-to-date condition and shall amend the SOPP whenever there is a change (e.g., in the design, construction, operation, or maintenance of the sewerage system or sewerage facilities) which materially affects the potential for sewer overflows. The discharger shall review and amend the SOPP as appropriate

after each sewer overflow from the PLOO or in the area tributary to the PLOO

NPDES Permit No. CA0107409, page 57 [emphasis added].

The City of San Diego is more than familiar with the consequences of the Water Pollution Control Act. From 1988 to 1997, the City defended against numerous allegations of violations of the act involving sewer overflows. After several lengthy court battles, the City successfully terminated all claims by committing to significantly upgrade its sewage collection, transportation, and disposal system. *U.S.A. v. City of San Diego*, Case No. 88-1101, Stipulated Final Order, June 6, 1997, pp. 3-5.

These federal prohibitions are not only mirrored but made cumulative in state law. Hence the California Water Code prohibits the intentional or negligent discharge of sewage or the creation of any condition of pollution.

§ 13350. Civil liabilities; recovery of amount; contribution; annual report

Any person who (1) intentionally or negligently violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of any waste discharge requirement or other order or prohibition issued, reissued, or amended by a regional board or the state board, intentionally or negligently discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state and creates a condition of pollution or nuisance, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, may be liable civilly in accordance with subdivision (d), (e), or (f).

California Water Code section 13350.

Moreover, the City or any employee that contributes to such a discharge is subject to criminal sanctions. California Water Code section 13387. Federal criminal penalties are similarly available. 33 U.S.C. section 1319. In light of his responsibility to public health and aware of such severe sanctions, the City Manager has devised and published a "Water and Sewer Design Guide," City Document No. 769817 (1994), with the express purpose of ensuring efficiency of water and sewer facilities:

This Guide contains guidelines for the planning and design of water and sewer facilities. *It summarizes and outlines policy, practices and procedures that have been developed to increase the efficiency of the Departments Operations.* The standards have been adopted to encourage exceptional quality in the work of the

Department. Also to be considered are all appropriate current Standard Drawings, Specifications and Industry Requirements for the planning and design of water and sewer facilities.

Preface, Design Guide [emphasis added].

It is precisely within this framework of stringent environmental obligations and published design guidelines that the attached August 12, 1998 letter was formulated. Hence the letter is replete with the City's "stringent" requirements for public improvement of sewer pump stations and its obligations to "Federal, State and Local authorities" to prevent sewer spills. August 12, 1998, letter, page 1. Accordingly, the entire second page of the letter lists five requirements that must be met before the City could approve the installation of the proposed pump station. To insist on these five specifics is to do no more than insist on the protection of the public health. The City Charter, the federal Water Pollution Control Act, and the state Water Code are explicit: sewage is to be efficiently collected, transported, and disposed of with severe sanctions for any omissions. Hence the City Manager has not only the authority, but indeed the obligation, to insist on careful compliance with the sound engineering practices embodied in the "Water and Sewer Guide."

That this obligation is the same for both water and sewer is clear from the public health and safety concerns that are attached to both. Additionally, San Diego Municipal Code section 67.51 quoted previously deals expressly with all water main extensions and mandates that the design, materials, and standards of construction of water facilities be approved by the City Manager.

CONCLUSION

Given the express responsibility to efficiently administer the water and sewer utility system, the City Manager has both the authority and duty to scrutinize all private proposals for such facilities to ensure their compliance with all applicable laws and sound engineering practices. In exercising this responsibility, he may properly require that any and all proposals involving the water and sewer system meet appropriate design guides that are promulgated and updated from time to time. Such responsibility to evaluate includes the power to accept, modify, or reject private proposals that affect the utility system. Moreover, such standards should be jealously guarded to diligently safeguard the public health.

CASEY GWINN, City Attorney

By

Ted Bromfield
Deputy City Attorney

Ms. Salvini

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October 20, 1998

TB:mb:(x043.2)

Attachment

cc F.D. Schlesinger

Prescilla Dugard

Larry Gardner

Charles Yackly

ML-98-25